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### Paperwork Redux: The (Stronger) Paperwork Reduction Act of 1995

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# PAPERWORK REDUX: THE (STRONGER) PAPERWORK REDUCTION ACT OF 1995

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## TABLE OF CONTENTS

Introduction .....	111
I. The Paperwork Clearance Process: Agency Responsibilities Under the 1995 PRA .....	113
II. The Broad Definition of "Collection of Information" .....	117
Conclusion .....	119

## INTRODUCTION

Although not a new law, the Paperwork Reduction Act (PRA or "the Act")<sup>1</sup> has been updated and strengthened. Its increasing importance warrants renewed examination of the Act and its role in shaping information and regulatory issues.

The PRA was originally enacted in 1980,<sup>2</sup> although its antecedents go back to the Federal Reports Act of 1942.<sup>3</sup> It was re-authorized and

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1. Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (to be codified at 44 U.S.C. §§ 3501-3520).

2. Paperwork Reduction Act (PRA) of 1980, Pub. L. No. 96-511, 94 Stat. 2812.

3. Enacted December 24, 1942, Ch. 811, 56 Stat. 1078. That Act was incorporated into Title 44, Chapter 35, U.S. Code, as part of the enactment of Title 44 into positive law pursuant to Pub. L. No. 90-620, 82 Stat. 1302 (1968). When the PRA of 1980 was enacted, the chapter was completely revised and given a new heading, "Coordination of Federal Information Policy." The legislative history of both the Federal Reports Act and the PRA of 1980 is detailed in William F. Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 HARV. J. LEGIS. 1 (1987).

amended in October 1986,<sup>4</sup> and thereafter on May 22, 1995. Describing the recent 1995 changes as "amendments" is somewhat inaccurate, however. The 1995 changes were in the nature of an entire recodification, as the Act was reenacted *in toto*, not merely amended.

In addition to establishing the Office of Information and Regulatory Affairs (OIRA),<sup>5</sup> the Act authorizes and requires OIRA to perform a rather astonishingly wide-ranging array of oversight functions relating to information resources in the federal government. For instance, the Act carves out an oversight role for OIRA on such crucial topics as how agencies disseminate information to the public (including electronic dissemination);<sup>6</sup> how agencies collect, maintain, and use statistics;<sup>7</sup> how agency archives are maintained;<sup>8</sup> how agencies develop systems for insuring privacy, confidentiality, security, appropriate disclosure, and the sharing of information collected by the government;<sup>9</sup> and last, how the government acquires and uses information technology.<sup>10</sup>

These are all major functions and concerns for the government, and they give the Office of Management and Budget (OMB) and OIRA a tremendous amount of power and clout within the government—even beyond what they already have with their budgetary and regulatory review roles. OIRA, of course, also has performed the lead role in reviewing agency proposed and final regulations, pursuant to presidential Executive Orders.<sup>11</sup> The function to be discussed here, however, will be the reviewing and approving of collections of information by federal agencies and reducing the burden of this information collection on the public.

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4. Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500, § 101(m) (tit. VIII, § 811), 100 Stat. 1783-308, 1783-335; Pub. L. No. 99-591, § 101(m) (tit. VIII, § 811), 100 Stat. 3341-308, 3341-335. (Pub. L. No. 99-591 is a corrected version of Pub. L. No. 99-500).

5. The original PRA of 1980 established OIRA in the Office of Management and Budget (OMB). OIRA coordinates federal information policies and oversees agency collections of information. 44 U.S.C.A. § 3504(a) (West Supp. 1996).

6. *Id.* § 3504(d).

7. *Id.* § 3504(e).

8. *Id.* § 3504(f).

9. *Id.* § 3504(g).

10. *Id.* § 3504(h).

11. See, e.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1981); Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

## I. THE PAPERWORK CLEARANCE PROCESS: AGENCY RESPONSIBILITIES UNDER THE 1995 PRA

Those most responsible for complying with the PRA are rightly asking, "What are we required to do under the PRA?" The short term answer lies in the paperwork clearance process established by the Act, including the Act's mandated paperwork reduction goals. There are, of course, two ways of looking at this topic. When I was working with the National Performance Review in 1993,<sup>12</sup> numerous complaints were voiced from all quarters regarding the abundance of paperwork. The small business community was up in arms about needless agency forms and paperwork, and the federal agency representatives were upset about what they perceived to be needless OMB forms and paperwork. That war of words was, not surprisingly, won by the small business interests, and the result was an even stronger PRA.

The Act's overall paperwork reduction goals place the clearance process in some perspective. PRA section 3505 sets an annual government-wide goal for reducing the overall paperwork burden by at least ten percent for each of fiscal years 1996 and 1997, and a five-percent goal for the four fiscal years after that.<sup>13</sup> Thus, the Act provides for an overall reduction from the 1995 basepoint of about thirty-six percent. That is an extremely ambitious goal, especially since most of the burden comes from the Internal Revenue Service (IRS). In 1992, for example, the Treasury Department accounted for eighty-seven percent of the entire government's burden hours.<sup>14</sup>

With the thirty-six percent basepoint goal defined, the PRA also sets forth a process for paperwork clearance. For the purpose of clarity, this discussion will forgo analyzing the definition of a "collection of information" (CI) until after the clearance process for CIs is examined. The PRA requires OIRA to review most information collection requests sought by

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12. The author served as Team Leader for the "Improving Regulatory Systems" team of the National Performance Review. See OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS (1993).

13. 44 U.S.C.A. § 3505(a)(1) (West Supp. 1996). The 1986 amendments, by contrast, set a goal of reducing the burden by five percent for fiscal year 1986 and each of the next two years.

14. UNITED STATES GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/PEMD-94-3, PAPERWORK REDUCTION: REPORTED BURDEN HOUR INCREASES REFLECT NEW ESTIMATES, NOT ACTUAL CHANGES 10 (1993) [hereinafter GAO REPORT].

agencies.<sup>15</sup> The agency, including every agency in the government except the Federal Election Commission and the GAO,<sup>16</sup> must establish an internal process to review proposed collections of information before they are sent over to OIRA. The process must be coordinated by an agency office that is independent of program responsibilities. The Act specifies a number of considerations that agencies must weigh for each proposed CI: evaluating the need for it, estimating the burdens in responding, and if appropriate, testing it through a pilot program.<sup>17</sup> Unless the CI is part of a notice of proposed rulemaking (or unless it is exempted), agencies must provide sixty days' notice in the *Federal Register* and otherwise consult with the public and affected agencies, for each new proposed CI or each extension of OMB approval for an existing CI. The *Federal Register* notice must seek comments on the need for the information, its practical utility, the accuracy of the agency's burden estimate, and ways to minimize that burden. Only after providing this sixty-day notice, do agencies submit their paperwork clearance packages to OIRA for clearance and approval.<sup>18</sup>

As part of its submission to OIRA, the agency must submit a formal certification (along with a record supporting it, including the comments received from the *Federal Register* notice) that each proposed CI is needed; is not necessarily duplicative; reduces, to the extent practicable and appropriate, the burden on respondents, including small businesses and small government entities; is written in "unambiguous terminology"; is implemented in ways consistent with the existing record-keeping practices of respondents; and indicates how long respondents must keep the documents.<sup>19</sup> In addition to these statutory requirements, OIRA has added some other requirements in its implementing regulations.<sup>20</sup> For example OIRA warns that it will not approve a CI that

requires respondents to report more often than quarterly, requires a response in fewer than 30 days after receipt, requires respondents to submit more than an original and two copies, requires retention of records (other than health, medical, government contract, grant-in-aid or tax records) for more than 3 years, contains a poorly designed survey, contains a pledge of confidentiality that cannot be backed up, or might lead to disclosure of trade secret information.<sup>21</sup>

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15. 44 U.S.C.A. § 3504(a)(1).

16. *See id.* § 3502(1). *See also* Kuzma v. United States Postal Serv., 798 F.2d 29 (2d Cir. 1986) (holding postal service regulations not subject to PRA review).

17. 44 U.S.C.A. § 3506(c)(1)(A).

18. *Id.* § 3506(c)(2)(A).

19. *Id.* § 3506(c)(3).

20. Controlling Paperwork Burdens on the Public, 5 C.F.R. § 1320 (1995).

21. *Id.* § 1320.5(d)(2).

When the agency submits the proposed CI to OMB, the agency must also publish a second notice of the request for OMB approval in the Federal Register.<sup>22</sup> In this notice, the agency must summarize and describe the need for the proposed CI, describe likely respondents, estimate the annual burden, and give notice that the comments may be submitted to OMB and the agency.<sup>23</sup> The agency submits Form OMB 83-1, "Paperwork Reduction Act Submission," a supporting statement, and the draft CI with supporting documentation to OIRA for review. OIRA has sixty days to review the submission but, in practice, has to make its decision after thirty days and within sixty days of the submission, as the Act specifies that the public has thirty days to comment to the OMB.<sup>24</sup>

If OIRA approves the request, it issues a control number which must be displayed on the collection.<sup>25</sup> In addition to this control number, the agency must include a notice to respondents on the form. This notice must include the reasons the information is being collected; the way it will be used; the estimated burden; whether responses are voluntary, required to obtain a benefit, or mandatory; and a statement that the respondent is not required to respond unless the CI displays a valid OMB control number.<sup>26</sup> If the agency's CI fails to display the OMB control number and the disclaimer that no response is required without the control number, then no respondent can be penalized in any way for failure to comply. This is known as the "public protection provision."<sup>27</sup> The 1995 amendments strengthened this provision by making clear that this protection can be invoked "in the form of a completed defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto."<sup>28</sup>

The OMB may not approve the CI for a period of longer than three years.<sup>29</sup> If OIRA fails to act within the sixty-day period, there is an

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22. 44 U.S.C.A. § 3507(a)(1)(D) (West Supp. 1996).

23. *Id.*

24. *Id.* § 3507(b).

25. *Id.* §§ 3507(c)(3)(B), 3512.

26. *Id.* § 3507(c)(1)(B).

27. *Id.* § 3512 ("Public Protection"). At least two criminal prosecutions have been dismissed due to violations of this provision. See *United States v. Hatch*, 919 F.2d 1394 (9th Cir. 1990) (holding failure to comply with Forest Service operations plan not offense when Forest Service requirements violated PRA); *United States v. Smith*, 866 F.2d 1092 (9th Cir. 1989) (holding violation of PRA precludes conviction of miners charged with working on unpatented mining claims without permit).

28. 44 U.S.C.A. § 3512.

29. *Id.* § 3507(g).

automatic approval for one year and a control number must issue.<sup>30</sup> Agencies are bound by an OIRA decision to disapprove a CI, except that there is a unique provision relating to independent regulatory agencies that permits such an agency to override OIRA's disapproval of a CI by a majority vote of the members of the board or commission. The term "independent regulatory agency" is defined in the Act and a list of existing ones is included in the definition.<sup>31</sup> OIRA's actions in approving or disapproving a free-standing CI are subject to review under the Administrative Procedure Act's<sup>32</sup> arbitrary-and-capricious standard.<sup>33</sup>

It should be noted that the aforementioned is the process for reviewing free-standing forms and CIs that are not included as part of proposed or current rules. The procedures for reviewing CIs in proposed rules and CIs in current rules are a bit different. OIRA's regulations helpfully separate these three categories or submissions.<sup>34</sup>

For CIs in *proposed* rules, the agency includes all the above-described information in the preamble to the notice of proposed rulemaking, which also states that the CI has been submitted to the OMB and directs comments to the OIRA desk officer for the agency.<sup>35</sup> Within sixty days the OMB may either approve the CI or file comments with the agency to be placed in the record.<sup>36</sup> If OIRA fails to comment on a rule of which it has received notice, it may not disapprove the CI contained in that rule.<sup>37</sup> If comments are filed, the agency will obviously have to react to those comments as it prepares to send its draft final rule to OIRA for its regular rulemaking review.<sup>38</sup> Thus, OIRA's two processes, rulemaking review and paperwork review, come together here, and it is obvious what kind of leverage the OMB has in this process. It is theoretically possible, of course, that OIRA will ultimately approve a final rule even if the agency does not accede to its paperwork comments, but in any event the agency

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30. *Id.* § 3507(c)(3).

31. *Id.* § 3502(5).

32. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1994).

33. *Id.* § 706. The OMB's actions under the predecessor Federal Reports Act were held reviewable. See *Shell Oil v. Department of Energy*, 477 F. Supp. 413, 428 (D. Del. 1979) (declaring OMB clearance of reports not "committed to agency discretion"), *aff'd*, 631 F.2d 231 (3d Cir. 1980), *cert. denied*, 450 U.S. 1024 (1981); see also *Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77 (D.C. Cir. 1991) (upholding OMB review and disapproval under PRA of provisions of HHS rule containing collection of information).

34. 5 C.F.R. §§ 1320.10-1320.12 (1995).

35. 44 U.S.C.A. § 3507(d)(1) (West Supp. 1996); 5 C.F.R. § 1320.11(a).

36. 44 U.S.C.A. § 3507(d)(1)(B); 5 C.F.R. § 1320.11(c).

37. 44 U.S.C.A. § 3507(d)(3).

38. See *supra* text accompanying note 11.

has to explain in the preamble to the final rule how it responded to OIRA's comments.<sup>39</sup> If OIRA finds that the agency's response to its comments is unreasonable, it may disapprove the CI within sixty days of publication of the final rule.<sup>40</sup> All communications between OIRA and the agency concerning disapprovals or required modifications must be made public, along with any outside comments the OMB receives.<sup>41</sup> Unlike its actions with respect to free-standing CIs, OIRA's decision to "approve or not act upon" a CI contained in an agency rule is not subject to judicial review.<sup>42</sup>

If the CI is in an *existing* rule, it still comes up for review by OIRA, upon expiration of the control number.<sup>43</sup> The agency may still enforce the rule during the review period, but if OIRA disapproves the CI, then the agency will be directed to undertake a rulemaking and complete it within 120 days, limited to consideration of changes in the CI.

There are some procedures for emergency processing by the OMB, if requested by the agency head or a designated senior official of the agency.<sup>44</sup> There are also provisions for OIRA to issue a formal delegation to agencies to handle their own approvals of CIs, provided the OMB finds that the senior official in charge is sufficiently independent of the program responsibilities to be trusted with this responsibility.<sup>45</sup> As of August 1995, there were only two such delegations in existence: one to the Board of Governors of the Federal Reserve System and a much more limited one to the managing director of the Federal Communications Commission.<sup>46</sup>

## II. THE BROAD DEFINITION OF "COLLECTION OF INFORMATION"

The Act does not apply to collections of information that take place in the course of intelligence activities, federal criminal investigations or prosecutions, federal civil actions, antitrust investigations, or administrative investigations against specific individuals or entities.<sup>47</sup> Otherwise, the

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39. 5 C.F.R. § 1320.11(f).

40. 44 U.S.C.A. § 3507(d)(4)(C).

41. 5 C.F.R. §§ 1320.11(f), 1320.11(i) (1995); *see also* 44 U.S.C.A. § 3507(e)(2) (West Supp. 1996).

42. 44 U.S.C.A. § 3507(d)(6). *See* Funk, *supra* note 3 at 79-80 for a discussion of this preclusion-of-judicial-review provision.

43. 44 U.S.C.A. § 3507(h); 5 C.F.R. § 1320.12.

44. 44 U.S.C.A. § 3507(j); 5 C.F.R. § 1320.13.

45. 44 U.S.C.A. § 3507(i); 5 C.F.R. § 1320.16.

46. 5 C.F.R. § 1320.16(d) (setting forth text of delegations in Appendix A to Part 1320).

47. 44 U.S.C.A. § 3518(c); 5 C.F.R. § 1320.4(a) (1995). *See* Phillips Petroleum Co. v. Lujan, 963 F.2d 1380, 1386-87 (10th Cir. 1992) (holding audit request not covered by



Act's coverage is quite broad, providing that a "collection of information" includes

the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of format, calling for either answers to identical questions posed to or identical reporting or record keeping requirements on ten or more persons, other than agencies, instrumentalities, or employees of the United States.<sup>48</sup>

It also covers "answers to questions posed to agencies, instrumentalities or employees of the United States which are to be used for general statistical purposes."<sup>49</sup>

To make sure that this definition is read broadly, OIRA's regulation contains an extensive list of items that are included within the definition:

report forms, application forms, schedules, questionnaires, surveys, reporting or record keeping requirements, contracts, agreements, policy statements, plans, rules or regulations, planning requirements, circulars, directives, instructions, bulletins, RFPs, interview guides, oral communications, postings, notifications, labeling or similar disclosure requirements, telegraphic or telephonic requests, automated, electronic, mechanical, or other technological collection techniques, or questionnaires used to monitor compliance with agency requirements.<sup>50</sup>

Similar broad definitions in OIRA's rule are offered for the ten-or-more-persons requirement (including any queries within a twelve month period),<sup>51</sup> agency "conduct or sponsorship,"<sup>52</sup> and "burden."<sup>53</sup>

While the Act does not define "information," the OMB's regulation defines it as follows: "any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form and whether oral or maintained on paper, electronic or other media."<sup>54</sup> This combination of a broad definition of "information" and a broad definition of "collection of information" leads to extremely pervasive coverage. Literally speaking, the requirement of a cockpit recorder in an airplane is covered because it is an oral statement of fact or opinion being imposed on ten or more persons. Warning placards or signs may also be covered, unless the wording is specifically dictated by the government.

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PRA).

48. 44 U.S.C.A. § 3502(3)(A).

49. *Id.* § 3502(3)(A)(ii).

50. 5 C.F.R. § 1320(3)(c)(1).

51. *Id.* § 1320.3(c)(4).

52. *Id.* § 1320.3(d).

53. *Id.* § 1320.3(b)(1).

54. *Id.* § 1320.3(h).

Purely voluntary surveys, even if used to determine whether regulated parties have problems with existing regulations, are covered, as are focus groups used to determine whether a regulation is clear or is burdensome, if more than ten persons are involved in the group. In fact, to help with that latter problem, I suggested a very simple amendment to the Act when I was serving in the National Performance Review, "add a zero," so that it would apply to requests directed at one hundred or more people, rather than ten. That fell on deaf ears. But I think we can all agree that the Act's scope extends far beyond what most people think of as "paperwork" burdens.

Because this definition of information is potentially so broad, the OMB also included a lengthy list in the regulation of what it generally does not consider information.<sup>55</sup> Although the OMB reserves its right to change its mind on any specific item, this list includes physical samples (e.g., urine samples), direct observation by employees (but only if it does not involve standardized oral communication), most solicitations in the *Federal Register*, clinical examinations, requests directed to a single person, aptitude or employment exams, and solicitations at public hearings.<sup>56</sup> Affidavits, oaths, affirmations, etc., are generally not covered, but a "certification" will be covered if an agency substituted it for some other regulatory or informational requirement.<sup>57</sup>

Finally, the OMB and agencies are to develop an annual Information Collection Budget, summarizing the changes from previous years and setting new goals within the statutory reduction goals mentioned earlier.<sup>58</sup> How this will work remains to be seen. As mentioned before, much depends on the IRS. And some things are beyond the control of agencies, like the census requirement in the year 2000. Moreover, there needs to be a good baseline. The overall government-wide burden increased in 1989 when the IRS changed the way its baseline was calculated.<sup>59</sup> Thus, there are major methodological issues raised by the Information Collection Budget.

#### CONCLUSION

In closing, certain issues of major importance raised by the Act and the OMB's regulations need to be mentioned. First, the 1995 amendments

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55. *Id.* § 1320.3(h).

56. 5 C.F.R. § 1320.3(h)(2)-(4) (1995).

57. *Id.* § 1320.3(h)(1).

58. *Id.* § 1320.17.

59. GAO REPORT, *supra* note 14, at 7.

settled the major question of whether agency rules that require businesses or individuals to maintain information for the benefit of third parties or the public were covered by the Act. The Supreme Court had ruled in *Dole v. United Steelworkers*,<sup>60</sup> involving OSHA's requirement that companies provide hazardous material notices to workers, that the Act did not so require. But the 1995 Act was amended, after a lot of wrangling in Congress, to make clear that it does now.<sup>61</sup> This means that many agency rules containing such requirements not previously reviewed by OIRA will now have to be reviewed.

Second, there has been some litigation over whether statutorily mandated paperwork requirements are subject to the Act. The OMB has acceded to court rulings that if the requirement is imposed directly by statute, such as the statutory requirement that a person file a tax return, the agency is not prevented from enforcing the penalty if the public protection provision is not followed.<sup>62</sup> However, this is only in the case of a purely statutory provision. If the statute simply gives the agency authority to impose a CI, any ensuing CI is subject to the public protection provision. Moreover, the OMB's position is that these statutory CIs are not completely exempt from the Act. OMB still expects to review such CIs, in part to make sure the agencies do not go beyond the statutory mandate.<sup>63</sup>

Third, issues have been raised as to how to balance the Act's requirements with the independence of the inspectors general in the various agencies and their gathering of information. It is fair to say that the OMB is still working on this.<sup>64</sup>

Last, commentators on the OMB regulation suggested that regulatory certification programs should not be covered, because they tend to be less

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60. 494 U.S. 26 (1990).

61. The key language is the addition of the phrase "or requiring disclosure to third parties or the public" to the definition of "collection of information." 44 U.S.C.A. § 3502(3)(A) (West Supp. 1996).

62. 5 C.F.R. § 1320.6(e) (1995). See *Salberg v. United States*, 969 F.2d 379 (7th Cir. 1992); *United States v. Neff*, 954 F.2d 698 (11th Cir. 1992); *United States v. Dawes*, 951 F.2d 1189 (10th Cir. 1991); *United States v. Hicks*, 947 F.2d 1356 (9th Cir. 1991); *United States v. Wunder*, 919 F.2d 34 (6th Cir. 1990).

63. See Preamble to OIRA's Final Rule, 60 Fed. Reg. 44,981 (1995) (quoting 1980 Senate Report: "The fact that the [CI] is specifically required by statute does not, however, relieve an agency of the obligation to submit the proposed collection for the Director's review.").

64. See *id.* at 44,982 (suggesting that it may be appropriate for inspectors general to submit CIs to OIRA independently of agency head).

burdensome on the regulated parties than full record keeping. The OMB has adopted a wait and see attitude on this one.<sup>65</sup>

Clearly, each agency will need to develop a sophisticated approach and a trained staff to navigate this statute. It requires a lot of lead time to get CIs cleared, and given the breadth of the coverage, there will be numerous disputes between agencies and OIRA. There will be wrangles over cuts in the agencies' annual CI budget, and small businesses will be observing this process with a watchful eye. In the end, it is safe to predict that there will be less paperwork burden on the public, but there will also be delays in regulatory implementation.<sup>66</sup>

As a parting thought, I'd like to reflect on the PRA's sister statute, the Freedom of Information Act (FOIA).<sup>67</sup> Most people consider FOIA a great success story, but Antonin Scalia once called it "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored."<sup>68</sup> It will be interesting to see how the Paperwork Reduction Act is spoken of ten years from now.

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65. *See id.* at 44,979-80 ("OMB prefers to see whether any issues arise in implementing this provision in the context of concrete situations.").

66. For a small example in a delay in agency action blamed on PRA review, see *Environmental Defense Fund v. EPA*, 716 F.2d 915, 917 (D.C. Cir. 1983) (awarding attorneys' fees against EPA for delay in implementation of reporting requirements; EPA blames OMB review under PRA).

67. 5 U.S.C. §552 (1994).

68. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar.-Apr. 1982, at 14.